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sideration in construing the contract, especially where the commissioners found that the method contended for by defendant had never been used and was impracticable.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 170.* 3 Va.-W. Va. Enc. Dig. 401, et seq.]

2. Appeal and Error (§ 266*)—Exceptions—Necessity—Report of Commissioners.—Any error of the commissioners in failing to allow for shrinkage of earth in measuring fills, in an action upon an excavating contract, cannot be first urged on appeal, where the finding of the commissioners was not excepted to on that ground; such error not appearing on the face of the report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.* 1 Va.-W. Va. Enc. Dig. 565, et seq.; 11 id. 735, 757.]

3. Appeal and Error (§ 1022*)—Findings of Commissioners—Conclusiveness—Approval by Court.—Where it is not clear that the commissioners, whose finding was approved by the court, erred in allowing plaintiff solid rock prices, instead of earth prices, for removing certain material, the court on appeal will not disturb such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.* 11 Va.-W. Va. Enc. Dig. 757, 758.]

4. Contracts (§ 300*)—Time of Performance—Extension.—Changes in an excavation contract, which required more work to be done, made after the original contract was executed, necessarily gave the contractor the right to further time for its completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1379; Dec. Dig. § 300.* 13 Va.-W. Va. Enc. Dig. 979.]

Appeal from Circuit Court, Wise County.

Action by A. J. Heninger against the Virginia & Kentucky Railway Company. From a judgment for plaintiff, defendant appeals, and plaintiff assigns cross-errors. Affirmed.

Bond & Bruce and *Vicars & Peery*, for appellant.

W. H. Werth and *Ayers & Fulton*, for appellee.

LETERMAN *v.* CHARLOTTESVILLE LUMBER CO.

March 10, 1910.

[67 S. E. 281.]

1. Trial (§ 343*)—Issue on Plea in Abatement—Effect of Verdict Thereon.—A verdict on issues raised by a plea in abatement for the nonjoinder of a defendant, establishing that the contract, for breach of which plaintiff sought to recover damages, was made with defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

personally, and not with the firm composed of himself and a defendant not joined, and that plaintiff had the right to sue defendant for the breach thereof, did not determine that defendant, in making such contract, may not have been acting, as averred in a special plea, in behalf of such firm; such question not being involved in the issues on the plea in abatement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. 809; Dec. Dig. § 343.* 1 Va.-W. Va. Enc. Dig. 6, 7. See also, 5 id. 354, et seq.; 13 id. 619.]

2. Principal and Agent (§ 136*)—Representation of Principal—Personal Liability of Agent.—An agent may become liable on a contract contrary to his actual intent; and if he contracts in such a form or under such circumstances as to make himself personally responsible he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself of responsibility.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 476-479; Dec. Dig. § 136.* 1 Va.-W. Va. Enc. Dig. 269.]

3. Principal and Agent (§ 146*)—Contracts for Undisclosed Principal—Persons Liable.—Where a person enters into a simple contract, oral or written, other than a negotiable instrument, in his own name, when he is in fact acting as another's agent and for his benefit, without disclosing his principal, the other contracting party may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract, but he cannot hold both.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 521-527; Dec. Dig. § 146.* 1 Va.-W. Va. Enc. Dig. 273.]

4. Principal and Agent (§ 143*)—Contracts for Undisclosed Principal—Right to Sue Thereon.—On a contract on behalf of an undisclosed principal, either the agent or his principal may sue; defendant, where the principal sues, being entitled to be placed in the same situation at the time of disclosure as if the agent had been the contracting party.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502, 503; Dec. Dig. § 143.* 1 Va.-W. Va. Enc. Dig. 273, 274.]

5. Principal and Agent (§ 146*)—Contracts for Undisclosed Principal—Suit against Agent—Damages Recoverable.—In case of a contract by an agent for an undisclosed principal, if the agent be sued by the other party, the latter may recover such damages as have resulted from breach of contract on the agent's part.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 521, 522; Dec. Dig. § 146.* 1 Va.-W. Va. Enc. Dig. 273, 274.]

6. Principal and Agent (§ 144*)—Contract for Undisclosed Principal—Suit by Agent for Breach—Damages Recoverable.—If an agent,

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contracting for an undisclosed principal, sues on the contract, he may recover such damages as have resulted by the breach thereof by the other contracting party, unless his principal interferes; and he is entitled to recover the full measure of damages, the same as though action was brought by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 512½; Dec. Dig. § 144.* 1 Va.-W. Va. Enc. Dig. 273, 274.]

7. Set-Off and Counterclaim (§ 28*)—Action on Contract—Special Plea of Set-Off.—Where either party to a contract has a right to sue the other for its breach, either, when sued, has a right to set up as a defense, as expressly provided by Code 1904, § 3299, as to a special plea of set-off in an action on a contract, any matter which would “entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or relief in equity, in whole or in part, against the obligation of the contract” sued on.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 47, 48; Dec. Dig. § 28.* 12 Va.-W. Va. Enc. Dig. 281, et seq.]

8. Set-Off and Counterclaim (§ 28*)—Action on Contract—Special Plea of Set-Off.—The purpose of Code 1904, § 3299, providing, as to an action on a contract, for a special plea of set-off, was to give precisely the same measure of relief on the plea filed thereunder as could be obtained in an independent action brought for the same cause; section 3303 declaring that a defendant, filing a plea under section 3299, shall be deemed to have brought an action.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 47, 48; Dec. Dig. § 28.* 12 Va.-W. Va. Enc. Dig. 278, et seq., 285.]

9. Set-Off and Counterclaim (§ 47*)—Contract for Undisclosed Principal—Action against Agent—Special Plea of Set-Off.—Defendant, sued on a contract, having the right to set up in a special plea, under Code 1904, § 3299, any damages resulting from a breach which he could have recovered in an independent action, the fact that his recovery over, if any, is for the benefit of a firm, on whose behalf defendant alleged in the special plea that he contracted, furnishes no ground of objection thereto; for, if the agent of an undisclosed principal sues, it is no ground of defense that the beneficial interest is in another, or that plaintiff, if he recovers, will be bound to account to another.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 101; Dec. Dig. § 47.* 12 Va.-W. Va. Enc. Dig. 284.]

10. Set-Off and Counterclaim (§ 47*)—Contract for Undisclosed Principal—Action against Agent—Set-Off of Damages.—In a suit against an agent for an undisclosed principal to recover on a contract

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the price of work, defendant, under Code 1904, § 3299, can set up in a special plea, and get the benefit of, damages resulting from plaintiff's failure to do the work in the manner and within the time provided, as fully as if he had sued independently to recover them, and no prejudice can result to plaintiff from compelling him to answer for nonperformance to the agent, whom he is holding for a breach, instead of the principal.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 101; Dec. Dig. § 47.* 12 Va.-W. Va. Enc. Dig. 284.]

11. Set-Off and Counterclaim (§ 27*)—Subject of Set-Off—Claims Arising Out of Same Contract.—When the demands of both parties spring out of the same contract, defendant may assert a claim for damages under his common-law right of recoupment, or under Code 1904, § 3299, which does not impair his common-law right, but in addition thereto permits defendant to recover any legal damages he can prove in excess of the damages claimed by plaintiff.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.* 12 Va.-W. Va. Enc. Dig. 279. See also 14 id. 924.]

Error to Corporation Court of City of Charlottesville.

Action by the Charlottesville Lumber Company against one Leterman. There was a judgment for plaintiff, and defendant brings error. Reversed.

Perkins & Pcrkins, for plaintiff in error.

H. W. Walsh and Gco. E. Walker, for defendant in error.

CARTER v. JEFFRIES.

March 10, 1910.

[67 S. E. 284.]

1. Specific Performance (§ 39*)—Sale of Land—Part Performance.—In a suit for specific performance of a parol agreement for the conveyance of land, it must appear that the parol agreement relied on is certain and definite in its terms; that the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; and that the agreement must have been so far executed that a refusal of full execution would operate a fraud on the party, and place him in a situation which does not lie in compensation.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.